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Persona, *Homo*, *Res*: Building a Boundary in Early Modern European Legal Thought

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Abstract

According to Roman law the same human being, the *servus*, can be understood as *res mancipi* or as *persona*, being part of the different kinds of persons described in Justinian's *Institutiones*. But in the third decade of the 18th century, it would be written that »Certissimum ergo iuris axioma est: quicunque nullo statu gaudet, iure Romano non persona, sed res habetur« (Heinecke). How and why did this distinction become so precise, and the boundary between the two concepts so impassable? Underlying this distinction is the joint action of two phenomena: serfdom and slavery in the modern age. Serfs and slaves define the concept of person because they constitute its boundary: on one side of the boundary there are persons, on the other *res*. Indeed, slavery and serfdom are at the basis of the legal concept of *persona*, which was transmitted from the ancient regime to 19th-century legal thinking. Comparing the many possible legal conditions between *persona* and *res*, legal thought established a moving boundary, located within individuals, making them sometimes the subject, sometimes the object of legal relationships. The mobility of this boundary, its uncertainty, its susceptibility to being the subject of continuous gradations, would be passed down to the concept of legal capacity.

Keywords: persona, serfdom, slavery

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Persona, *Homo*, *Res*: Building a Boundary in Early Modern European Legal Thought*

I. *Servi* and *Personae*

According to the Justinianic sources, the same human being, a *servus*, could be understood as *res* or as *persona*: the *servus* was undoubtedly considered *res* but, at the same time, the law of persons expressly referred both to free people and to slaves (D. 1.5.3; I. 1.3 pr.). Although *persona* and *res* were distinct concepts, Roman slaves, »*personae* und *res* zugleich«,[1] would have had »un embryon de personnalité qui s'est constamment développé au cours des siècles«.[2]

This »embryo of personality«, linked to the human condition of the slave[3] and to the notion of *homo*[4], has been emphasised by Roman law scholars.[5] But the subject of this article is not to follow the development of proper Roman law in itself; rather it is how early modern legal jurists used the Roman – and particularly the Justinianic – sources, and, more broadly, how they defined who counted as a *persona*.

As mentioned above, the Justinianic sources offered legal thinkers two possible avenues to pursue: to highlight and examine the condition *(conditio)* of the *servi* as *res* or, on the contrary, to underline and examine their condition as a person. Both were explored between the 16th and 18th centuries. Thus, in his commentary on the Justinian's Institutes, published in 1642, Arnold Vinnen emphasised how the notion of *servus* was open to different possible interpretations: »Sed nimirum duplex est servi consideratio, qua res, quae in commercio est, ut et reliquae res nostrae; et qua persona.«[6]

Nevertheless, the idea that the figure of the *servus* should be primarily, even exclusively, opposed to that of the *persona*, and therefore generally excluded from the subdivision of statuses, came to be asserted with ever increasing force. Instead of elaborating a concept of *persona* that included the figure of the Roman slave, a boundary was set between the concepts of *servus* and *persona* between the 16th and 18th centuries. This article aims to understand the reasons for this choice and to indicate the underlying phenomena and their consequences on the formation of the legal concept of *persona*.

The end point of this development may be seen in a passage by Heinecke, for whom »certissimum ergo iuris axioma est: quicunque nullo statu gaudet, iure Romano non persona, sed res habetur. […] Servus itaque est homo: est etiam persona, quatenus cum statu naturali consideratur […] sed ratione status civilis est ἀπρόσωπος.«[7] But its origins are far from straightforward.

In his *Commentariorum iuris ciuilis libri X* (1553), François Connan traced the category of the *servus* to the condition of *instrumentum*, capable only of

* Translation by Stephen Conway. I wish to thank the anonymous reviewer, whose insightful observations considerably improved the text.

1 Kaser (1971) 285, recently quoted by Saccoccio (2018) 46 ff; the latter refers to this as the »Doppelnatur der Sklaven«. When Savigny stated that Romans used »die Benennung *persona* […] für jeden einzelnen Menschen ohne Unterschied, namentlich auch für die Sklaven«, he was particularly referring to the use of the expression »persona servi«, e. g. in D. 50,16,215, and D. 50,17,22 pr. Savigny (1840), 2, 2, § 65, 33.

2 Baud (1993) 80, largely based on Morabito (1981).

3 »Mais cette *persona*, qui intéresse le droit, n'est pas nécessairement un ›sujet de droit‹. C'est plus largement l'être humain. Gaius poursuit en effet le *ius personarum* concerne les libres et les esclaves. Or ces derniers ne sont pas, à Rome, des sujets de droit. […] L'esclave est *persona*, parce qu'il est un être humain.« Gaudemet (1995) 2.

4 Referring to Gaius, Agnati wrote that »la categoria ›*persona*‹ include *omnes homines* (Gai., *Inst*. 1.9), poi ripartiti giuridicamente in liberi e schiavi; la naturale e originaria eguaglianza riguarda gli *homines*, non le *personae*.« Agnati (2009) 22.

5 See Agnati (2009) 22–25; Corbino et al. (eds.) (2010), in particular Bürge (2010) and Negri (2010); Gaudemet (1995); Melillo (2006); Paturet (2010); Peppe (2009); Sacchi (2010) 1241 ff.; Stolfi (2007), (2013) 8 ff.; Talamanca (1990) 76 ff. See also the observations of Ribas Alba on slaves as »sujetos potenciales«: understood as subject of duties (»sujeto de deberes«), »la idea de *persona* como *sujeto responsable*, dotada de *voluntas*, abraza por igual a libres y a siervos«, Ribas Alba (2011) 237–238. On the multiple meanings of the term *res* and the difficulty of translating it as »thing«, see Thomas (1980), (2002); Deroussin (2001) 119 ff.; Paturet (2019).

6 Vinnen (1730), 1, 3, 30.

7 Heinecke (1747), 1, 3, §§ 76–77, 19–20.

natural obligations – certainly *res*, but opposed not so much to the concept of *persona* as to that of *homo*.[8] A little later, in François Hotman's *Commentarius in quatuor libros Institutionum*, we read (at least in the 1588 edition) that »[homo] naturale nomen est. Persona, civile. Servi Personam non habent: sed eam a domino mutuantur l. 31 D. de hered. instit. [D. 28.5.31]. Interdum tamen Personae nomen generaliter usurpatur.«[9]

Also in the second half of the 16th century, Doneau's *Commentarii de iure civili* listed *vita*, *incolumitas corporis, libertas, existimatio* as what is »a natura cuique tributa«.[10] The subject is referred to by the pronoun alone (»cuique«). Shortly afterwards, he addressed the topic of statuses and the notion of *persona*, in pages whose importance has been repeatedly underlined by various historians.[11]

Doneau related the concept of *persona* to the subdivision of statuses offered by the Justinianic sources, and understood status as the foundation of the condition of *persona*.[12] For him, it followed that, as far as *ius civile* was concerned, the personality of the *servus* was linked to that of the *dominus*: thus, referring to a famous passage in the Digest, he reminded the reader that »quod attinet ad ius civile, servi pro nullis habentur *l. quod attinet D. de regul iuris* [D. 50.17.32[13]]«.[14]

Doneau thus did not explicitly contrast the figure of *servus* with the notion of *persona* in this instance. Nonetheless, he represented the *servus*, at least as far as *ius civile* was concerned, predominantly as a thing.[15] As already reported by Coing,[16] the *Iurisprudentia Romana a Iustiniano composita* by Hermann Vultejus, published a year later, also contained an important definition of the concept of person: »persona autem est homo habens caput civile. Quod positum est in tribus, in libertate, in civitate, in familia […].«[17] The concept of *persona* was thus firmly seen as a matter of *ius civile* alone, and for this very reason tended to exclude the *servus*.[18] It was thus consistent that Vultejus explicitly opposed the notion of *servus* to that of *persona* in his *Commentarius in Institutiones iuris civilis a Iustiniano compositas*, published in 1613: »servus igitur homo est, sed non est persona.«[19]

Both Doneau and Vultejus referred to forms of serfdom relevant to contemporary practice and

8 »Ea igitur servorum origo fuit, quod bello capti non occiderentur, sed servarentur ad usus domesticos, possiderenturque a dominis eo iure, quo caeterae res omnes, quae in commune hominum commercium cadunt. […] Hinc quam misera sit servorum conditio, potest apparere, cum in eos esset dominis potestas vitæ & necis: sub quibus ita viverent, ut ne hominibus quidem essent ascribendi. Servus enim, quia servus nihil habet hominis, sed instar pecudis est, rei familiaris & dominicæ instrumentum, ut scribit Aristoteles«, Connan (1558), 2, 1, 74 v. (78 ff).

9 Hotman (1588), 1, 3, 23. The passage is quoted in Deroussin (2015) 19.

10 Doneau (1589), 2, 8, 82.

11 Coing (1962); Cappellini (1990); Hattenhauer, C. (2011).

12 »Aber Donellus setzt den Begriff persona mit der Lehre von den drei status des Menschen im römischen Recht: dem status libertatis, civitatis, familiae in Beziehung. Er bezeichnet (Commentaria de iure civili II, 9) den Status als ius personae und als causa der persona im Rechtssinne. Nur kraft des Status ist man persona.« Coing (1962) 63. On this topic see, more recently, Hetterich (2016) 80 ff.

13 »Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt.«

14 Doneau (1589), 2, 9, 86.

15 Hence, regarding slavery by birth »in quo sequimur regulam eamdem, quam in caeteris animalibus dominio nostro subiectis. Nam et servi dominio nostro pariter subiciuntur. Ut ergo quae ex animalibus nostris nascuntur, iure gentium nostri sunt l. 6 D. de acquirend. rerum dominio [D. 41.1.6].« Ibidem, 2, 9, 84–85.

16 Coing (1962) 63.

17 Vultejus (1590), 1, 8, 58.

18 A little further on, Vultejus refers to Petrus Faber's Commentary on the title «de diversis regulis iuris antiqui» who wrote regarding D. 50.17.22 (»pr. In personam servilem nulla cadit obligatio.«) that »personae nomen Iuricons. hoc loco […] non civili sed vulgari loquendi genere posuit. Constat enim iure civili servum nullum esse, personam servum non habere, sed esse *ἀπρόσωπον* ex legibus: ut a Theophilo Institutionum Iustiniani paraphraste traditur *in initio tit. de stipulat. serv.*« Faber (1590), Ad leg. XXII, 19, 64.

19 »Hominis appellatio cum appellatione personae non est eadem. Illa enim, quam haec est generalior. Homo vocabulum est naturae, persona, juris civilis. Omnis persona est homo, sed non vicissim. Inde personam definiebamus hominem, qui caput haberet civile. Hoc autem qui habet, etiam habet naturale. Sed caput civile triplex est, libertatis, civitatis et familiae. Horum servus nullum habet, ut servus in usu juris pro persona non habeatur. Caput quidem habet naturale, quod ipsum si non haberet, ne homo quidem esset, sed non habet civile: de quo capite civili accipiendum est quod dicitur in *l. 3 in fin. D. de capit. minut*. [D. 4.5.3.1] quod servus nullum jus habeat, et Justinianus *in § servus, inf. de cap. diminut*. [Inst. 1.16.4] quod servus nullum caput habeat. Servus igitur homo est, sed non est persona, et quia homo tantum, liber vero ita homo est, ut praeterea etiam sit persona […].« Vultejus (1613), 1, 3, 40. On this, see Stintzing (1880), vol. I, 452 ff., 462; Mazzacane (1968–1969).

customary rights: Doneau mentioned the *adscriptitii*,[20] Vultejus in his *Commentarius* the *homines proprii*. Indeed, Vultejus specified that slavery had disappeared from the Christian world, though forms of servile bondage remained, especially in Germany.[21] What was missing in both works was a clear reference to contemporary slavery and the categories of unfree conditions it comprised. These were by then well-known to legal thought, and would gain particular centrality in the discussions of the jurists of the United Provinces (see section III. below). In the meantime, however, they dominated the thought of the jurists linked to the Second Scholasticism.

II. *Dominium*, serfdom and slavery

During the 16th and 17th centuries, Iberian jurists' discussions of slavery mainly focused on questions arising in two contexts: the indigenous inhabitants of the ›New World‹, on the one hand, and the traffic of enslaved human beings, mainly from Africa, on the other.

Regarding the inhabitants of the New World, it seems that these jurists did not propose a particular and unified category.[22] In Francisco da Vitoria's *Relectio de Indis* (1539), for example, the catalogue of concepts used to classify inhabitants of the New World is rather varied. In the first part (»Quo iure venerint Barbari in ditionem Hispanorum«), Vitoria discussed »infideles« and »haeretici«, and then compared »barbari« to other categories of subject whose condition as *minores* he underlined: »insensati«, »amentes«, »creaturae irrationales«, »pueri«[23] and, on at least one occasion, »rustici«.[24] The concept of natural slavery[25] was at the heart of the issue: »et sic, dato quod isti barbari sint ita inepti et hebetes, ut dicitur, non ideo negandum est habere verum dominium, nec sunt in numero servorum [civilium] habendi.«[26] Nevertheless, also in Vitoria's view, the indigenous people could, at least in part, be governed like *servi*.[27]

On this point, recourse was made to the category of *ius singulare*: the notion of *persona miserabilis* constituted the reference point for interpreting the legal condition of the *Indios*.[28] Furthermore, reflection on the theme of natural slavery and the relation between slavery and *ius gentium* has been indentified as a *leitmotif* in the thinking of Domingo de Soto, Luis de Molina, Fernando Rebelo, Francisco Suárez.[29] Cuena Boy has argued that, generally speaking, these jurists tended to »una teoría cuyo único tema son las vías de acceso al estado servil y no el contenido de este estado«.[30]

However, in some works the comparison of the legal condition of the *Indios* with the better-known forms of serfdom recurred. The indigenous population's condition was conceived on the basis of its relationship with slavery under Roman law, on the one hand,[31] and with servile conditions, on the other. This is the case in the works of Juan de Solórzano Pereira,[32] who discussed the condition of *Indios* more than a century after Vitoria's *Relectio*.

20 Doneau (1589), 2, 9, 86.

21 »ita ut anno Christi 1200, in universo ferme terrarum orbe servi amplius non fuerint […]. Supersunt tamen in locis nonnullis Germaniae etiamnum servitutis illius antiquae quaedam vestigia, cum reperiantur quidam aliis strictiore Jure devincti, ad servorum propius quam liberorum conditionem accedentes, qui cum revera servi non sint, novo nomine Homines proprii, *Leibeygne Leute* appellantur […].« Vultejus (1613) 43.

22 On the matter in general, see Cassi (2007) 92 ff.; Cuena Boy (2022a); García Añoveros (2000); on how the question of populations related to the concept of *dominium,* see Costa (1999) 114; Tellkamp (2004); Tosi (2002).

23 Vitoria (1996 [1539]), 1, 1, pp. 12–31.

24 Ibidem, 1, 1, 15, p. 30.

25 Castilla Urbano (2013) 9–11.

26 Vitoria (1996 [1539]), 1, 1, 16, p. 31. »Civilium« is possibly an interpolation: Pereña (1996) XCIX–CXX.

27 Vitoria (1996 [1539]), 1, 3, 17, p. 98. »Vitoria did not culminate the break with the doctrine of natural slavery. Instead, he fell back on a guardianship similar to that exercised over children or the demented, which left the fate of the Indians in the hands of the Spanish monarchs.« Castilla Urbano (2020) 11. On the gap between theory and practice in the 16th century, see Badorrey Martín (2017) 686 ff.

28 Duve (2008) 166 ff.

29 Cuena Boy (2022a); Castilla Urbano (2013). See also Condorelli (2014) 251 ff.

30 Cuena Boy (2022a) 229.

31 On the influence of Roman law on the thought and discipline of slavery in the Spanish colonies, see the framework provided by Watson (1989) 46 ff.; more recently, see also Navarrete (2006).

32 Solórzano Pereira (1629–1639); idem (1648). On Solórzano Pereira, see García Hernán (2007); Andrés Santos (2010); Duve / Pihlajamäki (eds.) (2015) passim.

Solórzano firmly stated that the indigenous were free: »Indos, et reliquos infideles, qui Fidei praedicandae, et conservandae causa Christianis Principibus subiiciuntur, naturali libertate privandos non esse: itaque summo semper studio a Catholicis nostris Regibus cautum.«[33] He defined this *libertas* chiefly by using Justinianic sources, such as the titles »de statu hominum« of the Digest and »de iure personarum« of the Institutes.[34] But this *libertas* was limited by personal services, and it was on the basis of these that Solórzano addressed the different classifications to which the condition of the *Indios* could be traced. Especially in the part of *De Indiarum iure* dealing with »de personis, et servitiis Indorum«, i. e. the first book of the second volume, he engaged with the traditional categories of serfdom – starting with *coloni* and *adscriptitii* – to define the indigenous population's condition.

One of the several passages in which Solórzano made reference to the forms of serfdom shows how the starting point of his discussion were the Justinianic sources, especially the traditional reference for the theme,[35] the title »De agricolis censitis vel colonis« in the *Codex*,[36] followed by references to passages from the *Liber Extra* as well as the *Siete Partidas* as annotated by Gregorio López.[37] Yet Solórzano also made ample reference to a variety of doctrinal sources, including Johann Friedrich Husanus' *Tractatus de hominibus propriis* of 1590,[38] which he cited at least ten times in the first book of the second volume of *De Indiarum iure*. A little further on, the example of the »homines manus mortuae« of France[39] also recurred. Discussing the German *homines proprii,* Solórzano cited a well-known passage by Zasius, in which the latter wrote that »hos homines in omnibus, & per omnia neque servos, neque adscriptitios, neque colonos, neque capite censos, neque libertos; neque statu liberos esse, sed novam quandam speciem facere, de omnium illorum natura et conditione aliquid participantem.«[40]

Indeed, for Solórzano the different types of serfdom – such as *adscriptitii*, *homines proprii*, *homines manus mortuae* – did not provide an adequate profile to define the legal condition, or possible conditions, of the *Indios*. Nonetheless, they furnished a basis for comparison and, ultimately, some elements to contextualise the different figures. To these elements others must undoubtedly be added in order to complete the picture, such as the concept of »persona miserabilis«[41] mentioned above. The reference to Roman law sources was a constant, however, as it is well shown by Solórzano's discussion of the category of Yanaconas.[42]

Above all, Solórzano constantly referred also to the condition of slaves *stricto sensu* – mainly to »Aethiopes«[43] – regarding which he suggested caution and even reminded his readers of the example of Spartacus' revolt.[44] This was the second context in which Spanish and Portuguese jurists discussed the matter of slavery: the trade of *Aethiopes* from Africa.

Iberian legal thinkers tended to frame the slave trade according to Roman law's scheme and *ex iure gentium.*[45] They particularly focused on the problem of the *titulum servitutis*, as scholars have highlighted for Domingo de Soto.[46] However, in some authors, there was clearly a tendency to attribute the status of legal subjects also to slaves, by reason of their human condition, *qua homines*.

This was the case, for example, in the writings of Luis de Molina, who also paid particular attention

33 Solórzano Pereira (1672), 1, 3, 7, p. 412; 2, 1, 1, 3, p. 2.
34 Ibidem, 2, 1, 1, 17, p. 4; 2, 1, 3, 48, p. 14; 2, 1, 4, 5, p. 20.
35 Conte (1996) 37 ff.
36 Solórzano Pereira (1672), 2, 1, 3, 20, p. 12. In particular, the reference is to C. 11.48.7, 8, 11, 20, 21, 22; also to C. 11.51.1; C. 11.52.1; C. 11.53.1; C. 11.63.4; C. 11.64.1; C. 12.33.3.
37 Solórzano Pereira (1672), 2, 1, 3, 20, p. 12. The reference is to X. 3.49.3; X. 5.6.2; Part. III, 18, 89: Siete Partidas (1611) 112.
38 Husanus (1590).
39 Solórzano Pereira (1672), 2, 1, 3, 33, p. 13.
40 Ibidem, 2, 1, 4, 96, p. 29. According to Zasius, »servi anonymi in nostra Germania homines proprii dicti, nec adscriptitii, nec coloni, nec capite-censi, nec statu liberi, nec liberti sunt, de omnium tamen natura aliquid participant.« Zasius (1550) 113.
41 Solórzano Pereira (1672), 2, 1, 27, pp. 194 ff.; but see also idem (1648), 2, 28, 230 ff.
42 Solórzano Pereira (1672), 2, 1, 3, pp. 9 ff.; idem (1648), 2, 4, 77 ff. The matter is discussed in more detail in Cuena Boy (2006).
43 Solórzano Pereira (1672), 2, 1, 4, 112 ff., p. 31.
44 Ibidem, 2, 1, 4, 116, p. 31.
45 AsCuena Boy put it, there was »una especie de inercia intelectual que impedía, incluso a la mayoría de los más motivados por los intolerables abusos de los traficantes y los propietarios de esclavos, superar el cuadro tradicional de análisis centrado en la concepción de la esclavitud como institución de derecho de gentes.« Cuena Boy (2022a) 217.
46 Cuena Boy (2022a) 193; Amezúa Amezúa (2018) 241. On the matter in general, see also Cuena Boy (2022b).

to various practical circumstances of the slave trade.[47] For Molina – who, however, seems to curtail the possibility of an unquestionably *iustum titulum servitutis* – the slave acquired an intermediate position between being an object and a subject of rights:[48] speaking of the limitations of the »ius dominorum in servos«, Molina chose to point out that »dominium in servos non tam amplum ius tribuit dominis, quam dominium in pecora […]. Tribuit quidem illis ius ad omnes eorum operas, quas recta ratio postulat […].«[49] Most importantly, he also listed several possibilities for the slaves to acquire goods for themselves, such as in case of a »pactum inter ipsos et dominum […]. Atque ea ratione multi servi propria pecunia seipsos redimunt«, or by donation: »quemadmodum enim inter dominum et servum, non qua servus est, sed qua homo, cui accidit ut sit servus, esse potest contractus.«[50]

The Portuguese jurist Fernando Rebelo also attributed limited autonomous subjecthood to slaves in a number of passages:[51] like Molina, he chose to point out that »dominium hominis in hominem non est sicut in pecudem«.[52] When discussing the legitimacy of selling *Aethiopes* in Portugal, he raised the issue of the limitations of the »potestas dominorum«: »cum illud inter Doctores absque controversia certum sit, potestatem dominorum super servos ita limitatam esse, ut solum ad debita, ac consueta sive rationabilia servitia extendatur.«[53]

Regarding the power of masters »quoad personam servi« and »quoad res servi«, Rebelo both circumscribed and asserted the possibility that slaves acquired goods for themselves: the »lex Caesarea«, according to which »quidquid servus acquirit etiam donatione, vel testamento, domino acquirit«, was »abrogata per consuetudinem«: »legitima tamen consuetudo praedictas leges abrogare potuit, et de facto abrogasse videtur in favorem servorum, tamquam miserabilium personarum«; »introductum est, ut servi post consueta servitia, caetera sibi acquirant, unde se possint redimere.«[54]

Generally speaking, it seems that Iberian jurists were careful to avoid an explicit condemnation of the buying and selling of slaves, which they tended to deem unavoidable. At the same time, however, they sought to limit the slave trade's devastating outcomes: thus, although an enslaved person was clearly the object of *dominium*, these jurists consistently resisted explicitly reducing the *servus* solely to a thing. Instead, these legal thinkers allowed a limited catalogue of rights for the slave *qua homo* to emerge, and therefore had no reason to develop a theory of legal statuses in which the *servus* was not *persona*.

III. *Servi*, *Personae*, *Leges Civiles*

During the 17th century, jurists in the United Provinces also addressed the issue of slavery, though the subject seems to have been much less central to their thinking than in the Hispanic world.[55] However, they seem to have been much more attentive towards conceiving slavery within the framework of a general status theory.

In his commentary on Justinian's Institutes (1642), Arnold Vinnen – moreover academically linked to Doneau indirectly[56] – emphasised that the notion of »servus« as derived from the Roman law sources was open to different interpretations: »Sed nimirum duplex est servi consideratio, qua res, quae in commercio est, ut et reliquae res

47 Amezúa Amezúa (2018) 244; Cuena Boy (2022a) 205 ff. On Molina, see also Haar / Simmermacher (2014); Hespanha (2001); Kaufmann (2014).

48 Simmermacher (2014) 33 ff.; Kaufmann (2014) 218 ff.

49 Molina (1615), 1, 2, 38, 5, p. 85, on which Kaufmann (2014) 218.

50 Molina (1615), 1, 2, 38, 5, pp. 85–86, on which see Haar-Simmermacher (2014) 479; Kaufmann (2014) 219. Elsewhere, Molina pointed out: »licet autem ex contractu servi civilis obligatio non oriatur, oritur tamen naturalis«, Molina (1615), 2, 2, 261, 6, p. 14, on which see Kaufmann (2014) 220.

51 »O domínio de um homem sobre outro homem não pode ser como o domínio sobre qualquer cabeça de gado. O escravo não pertence totalmente ao senhor; mas, dentro de certos limites, est sui júris.« Mauricio (1977) 181. On Rebelo see Amezúa Amezúa (2018) 249 ff.; Cuena Boy (2022a) 184 ff., 196 ff.; Zeron (2009) 294 ff.

52 Rebelo (1608), 1, 1, 9, p. 67.

53 Ibidem, 1, 1, 10, p. 72.

54 Ibidem, 1, 1, 11, Sectiones I and II, pp. 74–75.

55 »In vain we look for a profound and fundamental discussion on the subject of freedom versus slavery among the jurists. We find arguments in favor of both, but no theory.« Van Nifterik (2021) 161.

56 Feenstra / Waal (1975) 22–25.

nostrae; et qua persona […].«[57] Vinnen made the connection between the concepts of *servus*, *persona* and status very clear: based on the heading of the title »de iure personarum«, he showed how the term *persona* could refer to *homines* in general, and hence also to slaves.[58] From this, he also derived his definition of the concept of status: »item ius personae hic esse, quod statum et conditionem personae sequitur: nam status ipse est personae conditio, aut qualitas, quae efficit, ut hoc vel illo iure utatur; ut esse liberum, esse servum, esse ingenuum, esse libertinum; esse alieni, esse sui iuris. Itaque status rationem causae, ius effecti habet.«[59]

Vinnen made no direct reference to the issue of slavery in the colonies in this passage.[60] Instead, he referred to different types of serfdom: once again the »coloni« and the »adscriptitii«. To Vinnen, both types were ambiguous, placed somewhere between free and servile. He compared them to hermaphrodites,[61] distinguishing between the »coloni«, in whom he considered the free condition to »prevail«, and the »adscriptitii«, whom he denoted as »quasi servi«.[62] But these were not abstract categories: indeed, a little further on we read that

»in hisce et plerisque aliis Christiani orbis provinciis quamvis nulli amplius servi sint reperiuntur tamen adhuc homines conditionis adscriptitiae, sive rusticani glebae addicti et quasi proprii illius loci, cui adscripti sunt; ut in Hannonia, […] in Burgundia et multis partibus Galliae. Hi enim sunt quos vocant, *Gens de main morte*, *Homines manus mortuae* […]. Germania quoque ejusdem conditionis homines habet, quos appellant *proprios* […].«[63]

The picture presented in Ulrik Huber's *Praelectiones iuris civilis* (1678–1689) differed only little from Vinnen's position. Huber argued that the term *persona* could be understood either in a broad sense, equivalent to the notion of *homo* and thus including *servi*, or in a narrower sense, excluding them.[64] Here he, too, returned to the various forms of contemporary serfdom, which on the whole he deemed more likely to belong to the category of *servi* than to that of the free.[65]

Johannes Voet argued differently in his *Commentarius ad Pandectas* (1698–1704). Here, the theme of serfdom was likewise central, and Voet also discussed a fairly extensive catalogue of types

57 »Sed nimirum duplex est servi consideratio, qua res, quae in commercio est, ut et reliquae res nostrae; et qua persona, quatenus puta cognatus dicitur, *l. 14. §. 2 et seq. de rit. nupt.* [D. 23.2.14.2 ff.] quatenus liber fieri, haeres institui, etc. contrahere, et dominum de peculio obligare, ipse iterum naturaliter obligari et alios sibi obligare potest, *l. 14. ff. de oblig. et act*. [D. 44.7.14] Prout igitur consideratur, ita vel ad primum, vel ad secundum obiectum pertinet.« Vinnen (1730) 30.

58 »Unde intelligimus personam hic non qualitatem civis, sed hominis designare, aut potius hominem simpliciter: eamque appellationem tam servo competere, quam homini libero: sicut et in iure passim etiam servo tribuitur, *l. 3 pr. ne quis eum qui in voc.* [*sic*] [D. 2.7.3 pr.] *l. potestatis de verb. sign.* [D. 50.16.215] *l. 22 de reg. iur.* [D. 50.17.22].« Ibidem.

59 Ibidem.

60 On Vinnen in relation to the issue of slavery, see Van Nifterik (2021) 182.

61 »De agricolis et adscriptitii quaeri solet, quibus comparandi? Et quod in re non dissimili respondet Ulp. in l. 10 hoc tit. [D. 1.5.10] etiam hic responderi potest: ejus conditionis aestimandos esse, quae in eis praevalet.« Vinnen (1730) 30.

62 Ibidem.

63 Ibidem.

64 On Inst. 1.3: «Caput de personis duabus divisionibus constat. Prima est in liberos et servos; altera in eos, qui sunt sui vel alieni iuris. Ergo et servi sunt personae, *pr. Inst. de iur. personarum l. 22 pr. de R. I.* [D. 50.17.22] quatenus persona idem quod *homo* est, ut in titulo *D. de statu hominum*, qui respondet huic rubricae *de iure personarum*. At si persona qualitatem civis notet, iam servus erit *ἀπρόσωπος*, *impersonalis.*« Huber (1784) 15. See also Huber (1787) 33 on the title »de statu hominum« of the Digest.

65 »De adscriptitiis sive colonis certo fundo colendo addictis, quales hodieque (manus mortuae Gallis dicti) per Europam habentur, dubitatum est, servi an ingenui sint: videri ingenuos, ait *l. un. C. de colon. Thrac*. [C. 11.52.1] dicuntur servi in *l. 7 C. de agric. et cens*. [C. 11.48.7] nec a servis differre, *l. 21.* [C. 11.48.21] *l. ult. eod.* [C. 11.48.24] Et hoc verius est; quia tam ipsi, quam res ipsorum sunt in Domini potestate, *d. l. un. d. l. 21 et ult*. quia distrahi possunt, *ead. l. 21 l. 2. 4. 7. C. de agric*. [C. 11.48.2, 4, 7] Nihil autem aeque libertati adversatur, quam esse in commercio. Dominum certe quod vendi potest habet.« Huber (1784) 16.

of personal conditions in current law (or *ius hodiernum*[66]) that he thought were characterised by »macula servitutis«.[67] However, his treatment of these conditions was preceded by a direct reference to the issue of slavery in the colonies:

> »Si tamen Christiani cum barbaris bello commissi fuerint, ut ipsi capti barbarorum servituti addicuntur, ita talionis iure captos a se barbaros eodem servitutis jugo pressos tenent; sic ut aliquando ab Ordinibus Foederati Belgii cautum inveniamus, in talibus etiam vigere debent latas de servis leges civiles; addita tantum exhortatione, ne domini eos durius habeant, neve diebus dominicis, aliisque temporibus, ad publica pietatis exercitia destinatis, eos labore gravent. *Instructie van de Staten Generaal, voor de geconquesteerde plaetsen in Brazijl, 23 Augusti 1636, art. 85, 86.*«[68]

The *Instructie* Voet referred to in this passage was intended to regulate the organisation of the Brazilian territories conquered in 1624. The passage also represents an initial emergence of the theme of colonial slavery in the legal thought of the United Provinces. The theme was discussed together with serfdom and in terms firmly anchored in the principle of the common free condition of the Provinces' inhabitants.[69] Applicable were »latas de servis leges civiles«: civil laws in a broad sense, hence the entire Justinianic discipline of slavery, without specifications or restrictions, except for a fairly generic reference to the requirements of religious worship.

A few years before the *Instructie* of 1636, the *Ordre van regieringe in West-Indien* addressed by the States General to the Dutch West India Company on 13 October 1629,[70] had already referred to Roman laws in matters of contracts (the »gemeene beschreven Rechten«),[71] but without direct reference to slavery. That link was made in the 1636 regulations, in particular in the two articles cited by Johannes Voet: Art. 85 stated that »negroes and slaves must be treated well by their lords and masters, and, during the periods usually devoted to worship, sent to the public exercises of religion, and on days of rest they must not be burdened with work«;[72] Art. 86 ordered that »all laws and constitutions established by the common laws [de ghemeyne Rechten] concerning slaves and unfree individuals, and such ordinances as may be established and published on the subject by the council of nineteen« (i. e. the West India Company's management) be applied to them.[73]

Indeed, the 1636 regulations were referred to more than once in subsequent discussions, such as in Eduard van Zurck's 1711 *Codex Batavus*, a work arranged alphabetically by subject. The entry on

66 »This is traditionally understood to mean an ingenious mixture of *ius Romanum* and *ius patrium* (or *ius proprium*), which – of course – differed from country to country (e. g. the Roman-Dutch law for the Province of Holland).« Ahsmann (1997) 428 n. On the concept of *ius hodiernum*, see also Birocchi / Mattone (eds.) (2006); Birocchi (2012).

67 »Quid, quod et multis in locis, ac ipsis vicinis Gelriae Zutphaniaeque partibus, ubi sublatum est servitus jus, inveniuntur etiamnum homines proprii, aut ab iis haud longe diversi, adscriptitiis Romanorum in plerisque similes, nec omni carentes macula servitutis. […]. Atque hi non uno veniunt nomine, antiquitus dicti, Germanicis *leibeigene*, nostratibus *laten*, *lassen*, *keurmoedige*, *schotbare*, *hofhorige mannen*, *wastinische luyden*«. Voet (1776), 1, 5, § 3, 120. To understand the meaning of these and other distinctions, sometimes justified by »obscuro usu«, Voet referred to a particularly rich list of sources, on which see Van Nifterik (2021) 188–189.

68 Voet (1776), 1, 5, § 3, pp. 119–120.

69 »usque adeo, ut, si servus regionum nostrarum, ac plurium gentium aliarum fines intraverit, etiam invito domino possit confestim ad libertatem proclamare«. Ibidem, 119.

70 *Ordre van Regieringe soo in Policie als Iustitie, in de Plaetsen verovert, ende te veroveren in West-Indien*, in: Groot Placaet-Boeck (1664) 1235 ff. On this, see Watson (1989) 102 ff.; Schiltkamp (2003); Van Nifterik (2021) 179.

71 »In andere saecken van allerley Contracten ende handelingen, sullen gevolght werden de gemeene beschreven Rechten«, Groot Placaet-Boeck (1664) 1246. Schiltkamp (2003) 332.

72 »De Negros ende Slaven sullen by hare Heeren ende Meesters wel worden ghetracterrt, ende op behoorlijcke tyden als den Godts-dienst wert gepleecht, tot de publicque exercitien vande Religie werden gesonden, ende met geen arbeydt op de Rustdagen beswaert.« *Instructie van de Ho. Mo. Staten Generael deser Vereenighde Nederlanden, voor de hooge ende lage Regieringe der Geoctroyeerde West-Indische Compagnie*, Groot Placaet-Boeck (1664) 1247 ff.

73 »Ende sullen in haer reguard plaetse hebben alle de Wetten ende constitutien by de ghemeyne Rechten, wegen de Slaven ende onvrye Luyden gestatueert, ende de Ordonnantien die by de Vergaderinge der Negenthiene hier naer souden mogen werden gestatueert ende gepupliceert.« Ibidem. See Batselé (2020) 55–56.

»Slaven« is very brief: van Zurck quoted Articles 85 and 86 of the *Instructie* almost verbatim, with only a few additional remarks on the latter.[74]

Another work in which the 1636 *Instructie* left a trace was Jacobus Voorda's *Differentiae juris Romani et Belgici secundum ordinem digestorum*. Discussing the fifth title of the first book of the Digest (»de statu hominum«), Voorda wrote: »1. omnes homines in Belgio liberi sunt. 2. Sed in America Indiaque servos adhuc Belgae habent, in quos dominica Romanorum potestas ipsis competit. 3. Quin et in quibusdam Gelriae tractibus superest adhuc anomala quaedam servitus colonorum quorundam, qui adscriptitiis haud prorsus sunt dissimiles.«[75] Although he thus did not mention the *Instructie* explicitly, his notes (dating from the mid-18th century, and edited and translated in 2005 as *Dictata ad ius hodiernum*) make it clear that he was actually relying on them.[76]

Also in Voorda's *Differentiae,* then, the issues of slavery and serfdom were discussed together, within a more general treatment of status theory. Generally, legal thinkers in the United Provinces engaged with the topic of slavery in the colonies with reference to the 1636 regulations only sporadically. But in Vinnen as in Huber, in Johannes Voet as in Voorda, slavery and serfdom were treated as closely connected, within the general scheme of persons, to the point that, as has been noted, »also in legal theory a continuum can sometimes be perceived between unfree and free labourers, between slaves and non-slaves«.[77]

IV. *Tertium genus*

In the works of the German jurists who, between the 16th and 17th centuries, elaborated a theory of the status and law of persons, the theme of the *homines proprii* was much discussed: indeed, they took over the place previously occupied by slaves (*servi*) in the Justinianic texts (D. 1.5; I. 1.3) and thus contributed to establishing the boundaries of the concept of *persona*.

As we saw already in section I, *homines proprii* had a prominent place in Vultejus' thinking, who clearly contrasted the notion of *servus* to that of *persona* (»servus igitur homo est, sed non est

74 »Hier toe meene ik dat den brief van del H. Apostel Paulus aen Philemon diendt. 't Was de pyne waerdt in zulke menigte van Slaven, als toen onder de zedelijkste volkeren zelfs waren, met zulk een opmerkelijk geval van den bekeerden Onesimus te leeren, hoe zy en hunne Heeren sich moesten dragen, dat 't Christendom den eigendom en altoos durenden dienst niet wegnam, en dat de Slaven sich hunne Heeren niet mogten ontstelen. Dat wy ook by retorsie volkeren die ons Slaven maken alzo handelen is redelijk, en by Staten Generael geordineert. […] Dat, volgens 't voorschreven artikel, de erfenisse der goederen by gevryde Slaven verkregen als nog gereguleert wordt, en zulks patronen daer toe komen kunnen, in cas geen kindren zijn, is bekent.« Van Zurck (1711) 686.

75 Voorda (1745) 4.

76 »*Belgae habent*: Ibique ipsi a barbaris capti in servitutem rediguntur, eosque captos vicissim in servitutem redigunt«; »*Ipsis competit*: Certe enim *vol. II Placit. Holl. pag.* 1247 a Generalibus foederati Belgii Ordinibus cautum reperimus, in iis servanda ea esse, quae Romano iure de servis statuta sunt.« Voorda (2005) 32–34. Reference to the *Instructie* of 1636 is also central in a series of dissertations, published in Leiden during the 18th century, that discussed the Roman law of slavery, or its philosophical and religious justifications. But they also included pages dedicated to contemporary norms regarding slavery in some colonial territories. See in particular Royer (1762); Herbert (1774) (»in America, Indiaque servos adhuc Belgae habent, in quos dominica Romanorum potestas ipsis competit vide *Edict. Ordin. Gen.* quod prodiit d. 23 Augusti Anno MDCXXXVI, […] artic. 86 […]«, ibidem, 30); Beeldsnyder (1775) (»praeter jus Naturae, quod ibi obtinet, inveniuntur quoque expressae leges, quibus jura et officia, quae dominis in servos incumbunt, apertis verbis indicantur. Huc pertinet Edictum Ordinum Gen. quod prodiit die 23 Augusti 1636 ubi hae leguntur verba, in Art. 85 et 86 […]«, ibidem, 22–23); Vermeulen (1793) (»quod si consideremus leges ab OO. nostris latas, conditio servorum non est pessima, sed ad eam temperandam ac redigendam ad aliquam normam aequitatis, multa egregia statuta sunt in coloniis nostris. 1° OO. constituerunt, ut jus naturae, quod ubique gentium moribus valere debet nullaque lege civili labefactari aut convelli, in nostris quoque coloniis sancte colatur et conservetur. 2° Ut leges Romanae recentiores apud nos valeant«, with a footnote reference to articles 85 and 86 of the 1636 *Instructie*. Ibidem, 40–41). Quite similar is the content of Spencer (1779) – quoted in Huussen (1999) 104, no. 27 – whose author, true to his epithet »curacaviensis«, was particularly attentive to the problems of Curaçao. Here, too, the *Instructie* of 1636 appeared as the starting point and basis of the regulation (e. g. 5 ff., or 31: »pervenio iam ad alteram disputationis partem, qua disquiritur, secundum quasnam leges de iuribus et obligationibus dominorum intuitu servorum iudicandum sit, et quaestiones circa eadem oboriuntes decidendae? Clara sunt hanc in rem verba nostrae constitutionis art. 86 […]«).

77 Van Nifterik (2021) 179.

persona«[78]). According to him, however, »Leibeygne Leute« were not »servi«, though they retained some »vestigia«[79] of ancient slavery.

At least from Zasius onwards – for whom »servi anonymi in nostra Germania homines proprii dicti, nec adscriptitii, nec coloni, nec capitecensi, nec statuliberi, nec liberti sunt, de omnium tamen natura aliquid participant«[80] – German jurists tended to see »Leibeygne Leute« as not corresponding to any of the categories of persons offered in the Justinianic sources. Furthermore, although the term »homines proprii« was generally used to indicate them, no recurring set of rules could be formulated that applied to all of them.[81] However, of greatest interest to us here is the role played by these different categories in defining the legal concept of *persona*.

Particularly significant in this context are the works of some of the representatives of the *Usus modernus*, who were attentive to the themes of *ius hodiernum* and *ius Germanicum*. It is precisely in these works that the categories of current law had to deal with the schemes set out in the Digest and the Institutes.

Thus, Georg Adam Struve stated in his *Iurisprudentia Romano-Germanica forensis* (1670) under the title »de iure personarum seu statu hominum« (though the entire first book is entitled »de iure personarum«) that »personam […] significat hominem in societate civili viventem«.[82] His reasoning on slavery starts from it having fallen into disuse among Christians. However, according to Struve, in some places there are »homines proprii, *eigene Leute*, qui affinitatem cum servis habent«.[83] To these, whom he nevertheless considered free, Struve dedicated a separate chapter (»de secunda personarum divisione, et de potestate dominica«).[84]

In Johann Schilter's *Institutiones iuris*, the issue of slavery dominated the discourse of the title »de iure personarum«, and included the forms of serfdom.[85] Schilter had already discussed these in his *Exercitationes ad Pandectas*, referring to the category of the freedmen and to a form of »germanica libertinitas« characterised by »libertas restricta«.[86] In his *Collegium Pandectarum theoretico-practicum*, published posthumously in 1690, Wolfgang Adam Lauterbach also integrated the condition of *homines proprii* into the general framework of legal status: here we read that, although slavery was obsolete among Christians, its treatment under the title »de statu hominum« was still useful, not least because »veteris illius servitutis adhuc vestigia quaedam supersunt in hominibus propriis […] Germ. *Leibeigene*«. Their status, Lauterbach continued, was called »agricolatio«, »quae est conditio personae, quae, cum aggravatione status sui, ad varia obligatur onera«.[87]

In the *Specimen usus moderni Pandectarum* by Samuel Stryk (1690–1712), the theme of slavery was directly associated with that of serfdom:

> »Summam illam personarum divisionem, quod homines aut liberi sint, aut servi *L. 3 ff. h. t.* [D. 1.5.3] hodie in Imperio Romano non amplius usu servari, in confesso est. Quamvis enim in Germania non omnes homines liberi sint, nulli tamen amplius supersunt servi, sed tertium quasi genus datur, scil. propriorum hominum, quos *Leibeigen* vulgo vocant, et opponuntur *denen freyen Leuten*.«[88]

78 Vultejus (1613) 40.
79 See above, n. 21.
80 See above, n. 40.
81 For example, with reference to David Mevius' work, it has been written that »über die Rechtposition deutscher Bauern könne keine generelle Regel aufgestellt werden, man könne nur die besonderen Gewohnheiten, Satzungen und Bräuche einzelner Landschaften beobachten«. Schulze (1990) 147. On this subject, see also Wiese (2006).
82 Struve (1675), 1, 3, 1, 15.
83 »Quamvis vero hodie inter Christianos ejusmodi homines servi non habeantur, nisi quod a Turcis aliisque barbaricis gentibus capti pro servis inter Christianos censeantur, eo quod istae etiam nationes Christianos captivos pro servis habeant. Sunt tamen in quibusdam locis […].« Ibidem, 1, 3, 6, p. 18.
84 Ibidem, 1, 4, pp. 19 ff.
85 Schilter (1685), 1, 3, 20 ff., particularly §§ 4 and 5, 24–26.
86 »Etsi igitur liberti et adscriptitii revera liberi sunt, restrictior tamen eorum est libertas, quam ingenuorum. Eadem ratio est nostrorum hominum. Quare observandum est, vocem *Leibeigenschafft*, Germanis non denotare servitutem, statui libertatis oppositam, ut in iure Rom. sed significat tantum hominum alias liberorum necessitatem manendi & non emigrandi.« Schilter (1672), »Exercitatio theorico-practica ad Pandectas III. De statu hominum et praejudicialibus actionibus«, 5, 57 ff., particularly 61–63.
87 Lauterbach (1784), I, 5, 13, 85.
88 Stryk (1690), 1, 5, § 1, 78–79.

The statement that slavery was no longer practiced naturally only applied to Christendom: in conflicts with »infideles«, just as Christians could be enslaved, so they in turn could reduce others to slavery: »hinc nostri captivos infideles aequissimo retorsionis iure pro servis habent, et ita in infidelibus captis omnia servitutum jura sibi locum vindicant. Ex quo est, quod Tartari, Turcae et Aethiopes pariter cum servi Romanorum donari, vendi et legari possint, uti experientia idem comprobat.«[89]

Thus, with regard to the »infideles«, Stryk argued that the Roman rules on slavery regained their value as applicable law. By contrast, »homines proprii« differed from slaves,[90] enjoyed »ius connubiorum«, »ius contractuum« and »ius testamentorum«, and had »personam standi in iudicio«.[91] However, Stryk did not consider them entirely free: they formed a »tertium genus« that, within the framework of the law of persons, was distinct from, but related to, Roman slaves.

The link between the forms of serfdom and the legal concept of *persona* perhaps emerged most clearly in Christian Thomasius' *Notae ad Institutiones Iustinianeas*, published in 1712.[92] Thomasius began his title »de iure personarum« with a definition of the term *persona*, the origins of which have been traced back to Samuel Pufendorf.[93] For Thomasius, »est autem persona in sensu juriridico homo consideratus cum statu suo; & status est conditio hominis secundum quam jure singulari utitur intuitu juris publici vel privati; estque triplex, vel libertatis, vel civitatis, vel familiae.«[94]

In the very wording of the title »de iure personarum«, the *homines proprii*, explicitly contrasted to the freemen, replaced the slaves in the original text of the Institutes: according to Thomasius, the distinction between *liberi* and *servi* was in use in Germany, and the *homines proprii* were undoubtedly »servi«, but they were very different from the slaves of the Romans.[95] Like Stryk, Thomasius considered *homines proprii* to have »iura connubiorum, contractuum, testamentorum«,[96] but he did not see them as free.

In these passages, Thomasius' main objective seems to have been to trace the servile conditions existing in the German territories, and with them the main distinction of persons, back to their origins outside of Roman law.[97] To fully understand his reasoning, one must also look at his *Dissertatio de hominibus propriis* of 1701[98] and the *Dissertatio de usu practico distinctionis hominum in liberos et servos* of 1711,[99] to which the *Notae ad Institutiones* actually referred.[100]

But how was the concept of *servus* defined in the *Dissertatio* of 1701?[101] In a passage comparing the notion of *servus* with that of *famulus*, Thomasius wrote: »[M]ercenarii ut personae considerantur seu ut cives, *servi in civitatibus non ad personas pertinent, sed ad res* [emphasis added]. Unde famuli sub

89 »Nec puto, liberari ejusmodi captivum a nexu servitutis, si Christianam religionem receperit, quamvis Pius V, Pontifex sucepto baptismate eos liberos pronunciaverit.« Ibidem, § 3, p. 80.

90 »Quamvis vero horum propriorum hominum in omnibus Germaniae provinciis non eadem sit conditio, et hinc generali conclusione de eorum statu judicari vix possit: putarem tamen, generatim proprios homines in Germania dici posse in eodem statu esse, quo sunt liberi homines, nec servorum conditioni illos adscribendos: Restrictam tamen hanc esse libertatem, ne vergat in praejudicium praedii et inde dependentium servitiorum; hoc enim respectu ipsi eorumque liberi pro glebae abscriptis reputari possunt.« Ibidem, § 5, p. 82.

91 Ibidem, §§ 6–8, pp. 82–84.

92 Thomasius (1712). On this, see Lieberwirth (1955) 109.

93 »Entia moralia, quae ad analogiam susbtantiarum concipiuntur, dicuntur *personae* morales, quae sunt homines singuli, aut per vinculum morale in unum systema connexi, considerati cum statu suo aut munere, in qui in vita communi versantur.« Pufendorf (1672), 1, 1, 12, 10. Coing (1962) 65; Hattenhauer, C. (2017) 172.

94 Thomasius (1712), 1, 3, p. 13. The definition is, however, very close to that in the *Dissertatio de usu practico distinctionis hominum in liberos et servos*, published a year earlier: »*persona* hic est homo, consideratus cum statu suo. Status est qualitas moralis hominis, secundum quam iure singulari utitur intuitu iuris publici vel privati.« Thomasius / von der Portzen (1711), § 2, 3.

95 Thomasius (1712), 1, 3, p. 14.

96 Ibidem, 1, 3, p. 16.

97 On these aspects of Thomasius' thinking, see Luig (1998a), (1998b) 403 ff., (2006) 96 ff.; Lück (ed.) (2006); particularly Mohnhaupt (2006); Kern (2006); Steinberg (2006), esp. 356 ff.

98 Thomasius / von der Lahr (1701).

99 Thomasius / von der Portzen (1711).

100 Thomasius (1712), 1, 3, 13–14.

101 »Rustici servi praestare debent operas indeterminatas, et tales, credo, praestabunt adhuc hodie, ubi pro hominibus propriis habentur.« Thomasius / von der Lahr (1701), § 84, p. 55.

imperio sunt, servi sub dominio. Neque haec differentia Romanis peculiaris est, sed moribus aliarum gentium etiam conformis.«[102]

The nexus between the category of *homines proprii* and the legal concept of *persona*, located on the border between Roman law and *ius Germanicum*, was stated very clearly by Johann Gottlieb Heinecke. In his discussion of the title »de iure personarum« in his *Elementa iuris civilis secundum ordinem Institutionum*,[103] published in 1725, he wrote: »§ 75 Homo et persona in iure maxime differunt. Homo est, cuicumque mens ratione praedita in corpore humano contigit.[104] Persona est homo, cum statu quodam consideratus.«[105]

Heinecke immediately followed this with the definition of status:

> »§ 76. Status est qualitas, cuius ratione homines diverso iure utuntur: isque est vel naturalis, vel civilis, qui iterum in statum libertatis, civitatis, et familiae dispescitur. *L. ult. D. de cap. minut.* [D. 4.5.11] Certissimum ergo iuris axioma est: quicunque nullo statu gaudet, iure Romano non persona, sed res habetur.«

The *servus* could therefore be considered *persona*, but only according to *ius naturale*: »§ 77. Servus itaque est homo: est etiam persona, quatenus cum statu naturali consideratur: *L. 22 pr. D. de reg. iur.* [D. 50.17.22[106]] sed ratione status civilis est ἀπρόσωπος.«[107]

Heinecke concluded his discussion of the title »de iure personarum« by speaking of *homines proprii*:

> »§ 85 Ceterum Germanicae originis gentes semper haec principia ignorarunt [sic] […] servos quidem habebant, et hodienum passim habent *homines proprios*: sed eos non res esse, iudicant, verum personas, gaudentes iura connubii, contractuum, et testamenti factionis. Attamen glebae vel fundo adscripti, cum fundo venduntur, dominisque operas et censum debent, nec non quibusdam locis certam pecuniam pro libertate matrimonii, et praecipuum ex hereditate, veluti optimum caput, optimas exuvias cet. vid. Harprecht *Tract. de iure mortuarii* [sic],[108] et Potgiesseri *Tract. de statu et cond. serv. in Germania.*[109] Et hactenus serviunt: reliqua sibi adquirunt.«[110]

For Heinecke, the condition of *homines proprii* was therefore literally the reverse of that of Roman slaves: while he located them close to the boundary between person and thing and considered them also as the object of rights (»cum fundo venduntur«), he nevertheless unequivocally stated that *homines proprii* were *personae*, not *res*.

Heinecke returned to the point in his *Elementa iuris Germanici tum veteris tum hodierni*.[111] Here, he opened the treatment of the law of persons with the usual theme »de prima hominum divisione, et speciatim de servilis conditionis hominibus«, but this time according to the *ius Germanicum*, which radically differed from the Roman understanding: »personae ergo Germanis sunt omnes, quibus mens, ratione praedita, in corpore humano contigit, id est eaedem, ac homines.«[112] To define the concept of *persona*, Heinecke thus used roughly the same terms he had employed for the concept of *homo* in Roman law (»Homo est, cuicumque mens ratione praedita in corpore humano contigit […]«[113]), which served to underline how the notions of *persona* and *homo* coincided in the *ius Germanicum*.

102 »Et nescio, cur id immane videatur illustri Puffendorffio, quod servi rebus accenseantur, et quod eodem modo de servo quis dicat, hic meus est, ac de jumento hoc meum est. Etsi enim non negemus, dominum semper recordari debere, servum esse hominem, omnibus juribus humanitatis capacem, debet tamen misereri jumentorum.« Ibidem, § 30, 16; see Pufendorf (1672), 6, 3, 7, 843.

103 On the dating of this work: Wardemann (2007) 102; Feenstra (2004) 306 n. On Heinecke generally, see also Bergfeld (1996), (1999); Luig (2011), (2006) 98 ff.; Tanaka (1995).

104 Other editions use »contingit« (e. g. Amstelodami, Ianssonius-Waesbergius, 1738; Goettingae, Vandenhoek et Ruprecht, 1806). For the various editions, see Wardemann (2007) 102 ff.

105 Heinecke (1747), 1, 3, § 75, 19.

106 »*Ulpianus libro 28 ad Sabinum* pr. In personam servilem nulla cadit obligatio.«

107 Heinecke (1747), 1, 3, § 77, 20. On this point, Heinecke's comparison with the work of Arnold Vinnen when working on his *Commentarius in quatuor libros Institutionum* is of interest, as noted in Luig (2011) 223.

108 This is probably a reference to Harpprecht et al. (1685).

109 Potgieser (1707).

110 Heinecke (1747), 1, 3, § 85, 21–22.

111 On the *Elementa iuris Germanici,* see Luig (1998b) 414; Wardemann (2007) 46 ff., 99.

112 Heinecke (1748), 1, 1, § 20, 9.

113 Heinecke (1747), 1, 3, § 75, 19.

As in his *Elementa iuris Civilis secundum ordinem Institutionum*, Heinecke also followed the discussion of the servile condition in the *Elementa iuris Germanici* with that of the *homines proprii*, with which the title »de prima hominum divisione« concluded.[114] For Heinecke, the fact that *homines proprii* were *personae* did not preclude them from being the object of rights in certain respects: they could, for example, be freely alienated (»a dominis libere alienantur«).[115] Although the *homines proprii* were thus very different from Roman slaves, their condition was still servile.[116]

In these passages by Heinecke, the link between the different forms of serfdom and the elaboration of the legal concept of *persona* appears fully developed: a category of individuals was identified and defined whose members, although servile, escaped the condition of *res*. Although remaining on the border between being the subject or object of rights, Heinecke's *homines proprii* had a residual form of personality. The contrast with the slave under Roman law, who escaped the condition of res only in natural law, guaranteed this residual personality.

But just who in truth were these slaves? As we have seen, Roman regulations on slavery could be seen as law currently applicable to »Tartari, Turcae et Aethiopes« or generically »infideles«: all poorly defined, or at the very least peripheral, categories. In the eyes of the jurists linked to the *usus modernus* movement, the space they inhabited was almost exclusively theoretical.[117] However, it was actually very real.

V. *Choses mobilières*

Antoine Loysel's *Institutes coustumières* (1607) established the principle that »toutes personnes sont franches en ce Royaume, et si tost qu'un esclave a attaint les marches d'iceluy, se faisant baptiser, il est affranchy«.[118] However, also in the works of French jurists who, between the 16th and 17th centuries, provided an outline of categories of persons according to current local law, the various forms of serfdom dominated the discussion.[119]

Thus, in the *Pandectes ou Digestes du Droict françois*, Charondas Le Caron, after insisting that slavery had fallen into disuse, mentioned the »hommes de serve condition«.[120] In Guy Coquille's *Institution au Droict des Francois* (1607), we read that

> »les servitudes qui sont en France, ne sont pas semblables à celles qui estoient en usage aupres des anciens Romains, qui faisoient trafic des personnes serves, comme d'animaux brutes. […] Mais bien sont semblables aux servitudes ascriptices, & colonaires, qui rendoient les personnes attachées & liées aux domaines des champs pour les faire valoir, & y estoient tellement attachées, que le proprietaire du domaine & des serfs y destinez, ne pouvoit vendre les serfs, sans vendre le domaine par une seule vente.«[121]

Similarly, the title »de l'état des personnes« of Gabriel Argou's *Institution au droit français* (1692) opens with »des Serfs de main-morte«.[122]

However, a few years before, the context had been radically changed with the *Édit sur les esclaves des îles de l'Amérique* of March 1685, the so-called *Code Noir*, which explicitly designated slaves movable property (Arts. 44 and 46; Arts. 40 and 42 in the 1724 edict for Louisiana).

The bibliography on the *Code Noir* is extensive.[123] Among other things, it has been debated whether and to what extent the original text actually owed a debt to the sources of Roman law,[124] and it has been widely emphasised that

114 Heinecke (1748), 1, 1, §§ 38 ff., 15 ff.

115 »§ 40. Ex eodem principio consequitur 5. vt homines proprii et soli, et cum familiis, et una cum praediis, quin et cum peculio suo, […] recte alienentur. […].« Ibidem, 1, 1, § 40, 17.

116 »Ex quibus omnibus iam satis patet, […] absurde plerosque negare, Germanis esse servos, multoque absurdius […] homines proprios ab iis servili conditione eximi.« Heinecke (1748), 1, 1, § 47, 20–21.

117 However, regarding the practical outcomes, see Mallinckrodt (2021).

118 Loysel (1607), 1, 1, 3, 1.

119 For an overview on these authors, see Thireau (2006).

120 Charondas Le Caron (1607), 2, 2, 6.

121 Coquille (1607) 134.

122 Argou (1730), 1, 1, 3.

123 Niort (2015) (on the name »Code noir«, see 21 ff.); Niort / Pluen (eds.) (2018); Patisso (2019). For an overview, see Deroussin (2010) 36 ff.

124 Watson (1989) 85 ff.; Palmer (1996); Watson (1997); Mignot (2004) (2010); Palmer (2012); Charlin (2015).

reducing the slave to a thing in the *Code Noir* in no way entailed a negation of his humanity.[125] Moreover, in a similar way to the 1636 *Instructie* of the United Provinces' States General, the 1685 edict dealt with the religious and spiritual education of slaves early on, in its second article.[126]

Of interest to us is the question of what effect, direct or indirect, the norms of the *Code Noir* had on the juridical notion of the person, first and foremost in the works of French jurists of the late 17th and 18th centuries.

In his *Lois civiles dans leur ordre naturel* (1689), Domat closely linked the subdivision of persons, both under the law of nature as well as under civil law, to the concept of status.[127] However, in his discussion of the status of persons under civil law in his work's *livre preliminaire*, Domat did not address the subject of overseas slaves: of the three major dichotomies of Roman law – free and slaves, »citoyen« and »étranger«, »pere de famille« and »fils de famille« – he recognised only the last two as being in use in contemporary France; to these he adds the subdivisions of French law: »gentilhommes«, »bourgeois« and »personnes de condition serve«.[128] While Domat also discussed the subject of slavery in the proper sense, to him, this category seems to have been of above all theoretical importance.[129]

In Robert-Joseph Pothier's *Treatise on Persons and Things*, by contrast, the subject of slavery is defined and explored in full, though there is no direct reference to the *Code Noir*. Pothier's passage on the subject is famous: after describing the legal conditions of ecclesiastics, nobles and the third estate (and before addressing the distinction between »regnicoles« and »aubaines«), Pothier discussed *des serfs*, by which term he denoted both those of servile condition as well as slaves. Nevertheless, he argued that the *serfs* present in some provinces of the French kingdom, called »gens de main-morte et mortaillables«, were in every respect different from the *serfs* of the Romans:

> »Ces esclaves, chez les Romains, n'étaient pas citoyens; ils n'avaient aucun état civil, *pro nullis habebantur*; ils étaient regardés comme des choses, plutôt que comme des personnes, *ut res, non ut personae erant in dominio heri*; c'est-à-dire qu'ils appartenaient à leurs maîtres, de la même manière qu'un cheval, ou tout autre meuble: et par conséquent ils ne pouvaient rien avoir en propre, et tout ce qu'ils acquéraient était dès l'instant acquis à leur maître, à qui ils appartenaient eux-mêmes. Nous avons dans nos Colonies *de ces sortes d'esclaves*, qui sont les Nègres, dont il se fait un commerce considérable. Mais, dans le Royaume de France, on n'en souffre aucuns.«[130]

In this passage, Pothier combined several features that we have already encountered elsewhere. Firstly, he treated the themes of serfdom and slavery together. Secondly, his key reference for slavery was Roman law, which served a number of functions: it was useful for defining the serfs of current local law in opposition to Roman slaves (although the term *serfs* was employed for both), but also for defining the slaves (*esclaves*) that the French owned in the colonies; lastly, he directly contrasted the condition of the slave as a thing (»chose«, »res«) to the condition of person (»personne«).

125 »[L]e rapport théorique entre humanité et personnalité juridique en vigueur à l'époque du Code Noir *n'est pas* celui du droit contemporain […]. Lorsqu'on dénonce le Code Noir comme une négation juridique de l'humanité de l'esclave, on oublie en effet que le statut servile *implique* fondamentalement cette humanité, et que la réification juridique n'est qu'une fiction inhérente à ce statut même. […] Le droit romain nous l'indiquait déjà: la réduction juridique de l'esclave à une *res* ne lui enlevait pas sa qualité humaine.« Niort (2011) 5–6. See also idem (2015) 37–47.

126 »Tous les esclaves qui seront dans nos Iles seront baptisés et instruits dans la Religion catholique, Apostolique et Romaine. Enjoignons aux habitants qui acheteront des Negres nouvellement arrivés, d'en avertir les Gouverneur et Intendant desdites Isles dans huitaine au plus tard, à peine d'amende arbitraire, lesquels donneront les ordres nécessaires pour les faire instruire et baptiser dans le temps convenable.« Code Noir (1788) 30. See also Mignot (2010) 44–45.

127 Domat (1689), Livre prel., 2, 34.

128 Ibidem, Livre prel., 2, 2, 44–45.

129 »Et pour l'esclavage, quoyqu'il n'y ait point d'esclaves en France, il est necessaire de connoître la nature de cet état.« Ibidem, Livre prel., 2, 2, 44.

130 Pothier (1778), 1, 4, 571. Under the aspect of insurance regulations, see also Pothier's *Traité du contrat d'assurance*, 2, § 2, 28 (»[…] les Negres étant des choses qui sont dans le commerce, & qui sont susceptibles d'estimation […]«), Pothier (1773) 12. On this issue, see Philip-Stephan (2008) 565; Storti (2020) 54 ff.

Pothier's passage clearly expresses the link that united the themes of serfdom, slavery and the legal concept of the person in 18th-century French legal thinking.[131] However, the role of the concept of person changed in Enlightenment thought.

In the entry »Esclave (jurisp.)« in the *Encyclopédie*, Antoine-Gaspard Boucher d'Argis wrote that Roman slaves »n'étoient point mis au rang des personnes, on ne les regardoit que comme des biens«, and mentioned the edict of 1685, according to which »les esclaves sont meubles«.[132] But the loss of centrality of the juridical concept of person is shown by the fact that only two entries in the *Encyclopédie* were dedicated to the term »personne«: one, by Nicholas Beauzée, dealt with the grammatical meaning of the term; the other, anonymous, discussed its theological meaning.[133] In addition, with the abolition of serfdom in the French royal domains in August 1779, one of the terms of reference of the concept of person, and thus one of its functions, had disappeared: shortly after, there no longer was a group whose members' status could be contrasted to that of the overseas slaves on the grounds that, unlike the latter, they were deemed »persona«. Eventually, in the revolutionary constitutions and in the *Code civil* itself, the term »personne« came to occupy a marginal position, while other categories of legal subjects gained in importance, as we shall see in section VI.

In 18th-century Germanophone legal thought, however, the concept of person seems to have retained its importance. Christian Wolff is credited with the famous definition that »homo persona moralis est, quatenus spectatur tamquam subjectum certarum obligationum etque iurium certorum«.[134] In many other works, however, the link between the notion of person and the dual reference to serfs and Roman slaves was retained.

For example, in the popular *Ius controversum civile* (1713), Samuel von Cocceij began his treatment of the title »de statu hominum« by addressing the issue of the comparison between *homines proprii* and slaves (»an homines proprii recte comparentur servis?«), and stated that while the comparison was wrong »quoad personam«, »quoad actiones« it was correct.[135] Nearly thirty years later, in his *Novum Systema iustitiae naturalis et Romanae* (1740), Coccejus again closely linked the notions of person and status,[136] returning to the statement that »servile caput […] nullam personam habere dicitur«.[137]

In Johann Stephan Pütter's *Elementa iuris germanici privati hodierni* (1748), there are two different subdivisions of persons, one into *ordines* (»personae illustres, nobiles, cives, rustici«),[138] the other linked to the different forms of relationships between private individuals (»de societate coniugali«, »paterna«, »tutelari«, »herili«). In the latter, the category of *homines proprii* is discussed at length.[139] In Kreittmayr's notes on the *Codex Maximilianeus Bavaricus Civilis* of 1756, too, the contrast between Roman slaves and »unsere Leibeigene« plays a significant role.[140]

The link with earlier reflections on the concept of person emerges particularly clearly in certain passages by Daniel Nettelbladt. Although there are no direct references to the themes of slavery and serfdom, echoes of Thomasius'[141] and Heinecke's[142] definitions of *persona* are evident. In fact, in the second edition of the *Systema elementare universae iurisprudentiae positivae communis imperii Romano Germanici*, we read that »persona stricte accepta, est homo consideratus cum certo statu«;[143] in the *Systema elementare universae Iurisprudentiae naturalis*, Nettelbladt wrote: »*persona* in sensu generali idem est ac homo. *In sensu speciali*

131 Another example, but less complete, in Serres (1753), 1, 3, 11 ff.

132 Boucher d'Argis (1755) 939 ff., 940–942.

133 Beauzée (1765) 431 ff.

134 Wolff (1750), § 96, 50, on whom see Coing (1962) 65.

135 »Non recte illis comparantur quoad personam: hactenus enim homines proprii liberi sunt, uti quotidiana praxis id testatur […] eos non excludi a communione juris civilis […]. Sed quoad actiones possunt omnino servis aequiparari […].« Cocceji (1753), 1, 1, 5, p. 70.

136 »Status hominum est conditio, per quam persona capax sit jurium, quae ad statum hominum pertinent.« Cocceji (1750), 3, 1, § 106, 57.

137 Ibidem, 3, 1, § 133, 71.

138 Pütter (1748), §§ 133 ff., 36 ff.

139 »De societate herili, sigillatim de hominibus propriis, rusticisque, quorum servilis est conditio«, ibidem, §§ 440 ff., 143 ff.

140 »Daß unsere Leibeigene mit den Römischen *Servis et Mancipiis* in keine Vergleichung kommen, ist jedermann verstanden.« Kreittmayr (1758), 1, 8, 2, 299. See Conrad (1956) 10–12.

141 »Est autem persona in sensu juridico homo consideratus cum statu suo.« Thomasius (1712), 1, 3, p. 13.

142 In the *Elementa iuris civilis secundum ordinem Institutionum*: »persona est homo, cum statu quodam consideratus«. Heinecke (1747), 1, 3, § 75, 19.

143 Nettelbladt (1762), 1, 1, 12, § 142, 93.

vero sub *personae* nomine venit, homo consideratus cum certo statu.«[144] Similar definitions can be read elsewhere in his works.[145]

A very close link to the previous reflections on status and person appears in Julius Friedrich Höpfner's *Theoretisch-praktischer Commentar über die Heineccischen Institutionen* (1783). Here, dealing with the title »de iure personarum«, Höpfner followed Heinecke's reasoning:

> »[W]er keinen bürgerlichen Zustand hat, ist keine Person, sondern wird in die Classe der Sachen gerechnet. Dergleichen sind nach Römischem Rechte die Sclaven *(servi)*. Sie haben keinen einzigen bürgerlichen Zustand, gar keine Rechte im Römischen Staate; daher werden Sie auch nicht als Personen, sondern als Sachen *(res)* angesehen.«[146]

The categories of the *adscriptitii* and the *coloni* also return.[147] There follows a paragraph devoted to modern-day slavery (»von der heutigen Sklaverey«): »wir haben heutzutage« both slaves in the sense of Roman law (»im Sinne des Römischen Rechts«) and »Leibeigene«, as well as free servants and maids (»freye Knechte und Mägde«). »Wahre Sklaven« were Turkish prisoners and »Negersklaven«, who sometimes arrived »aus Holland oder andern Reichen«; in both cases, Roman law applied.[148] The paragraph then goes on to consider the subject of serfdom: »wir haben aber auch in Deutschland Leibeigene«, i. e. individuals who are not free, to whom the lord has a right of ownership[149] (but, of course, Roman law must not be applied to them[150]). The paragraph ends with a brief mention of the subject of domestic servants, who are free in all respects except for their duties of service.[151]

In a similar vein, Christian Friedrich von Glück, in the part of the *Ausführliche Erläuterung der Pandekten* dealing with the title »de statu hominum«, certainly included Roman slaves among things.[152] Moreover, he also immediately followed his discussion of slavery under Roman law[153] with that of the *Leibeigenen*,[154] who, in his view, were quite different from Roman slaves, but not with-

144 »*Status* autem hoc loco est qualitas, secundum quam homines diversis iuribus et obligationibus utuntur.« Nettelbladt (1767), 3, 1, 1, § 43. The passage is quoted in Lipp (1982–1983) 251.

145 »Quodsi nunc homo seu persona in sensu latiori, non simpliciter ut homo, sed cum certo statu consideratur dicitur persona in stricto et proprio, unde persona in hoc sensu est homo cum certo statu consideratus. Strictissimus personae significatus vero ad iurisprudentiam privatam remittendus est, et hic de personis non nisi in sensu generali et strictu agendum.« Nettelbladt (1781), 1, 2, 1, 14, 14–15. On another passage of Nettelbladt, see Hattenhauer, C. (2011) 52 n. On this, see also Cappellini (1990) 110.

146 Höpfner (1798), § 62, 86 (but see also ibidem, 90 n. 15). On Höpfner, see recently Mallinckrodt (2021) 144 ff.

147 »Mit dem *servo colono* hat es folgende Bewandtniß: ein Sklave, den sein Herr auf sein Landgut gesetzt hat, um es zu bauen, heißt *servus adscriptitius*, oder *glebae adscriptus*. Dieser war entweder ein wahrer Sclave, oder er hatte eine Art von unvollkommener Freyheit. Im letzten Fall heißt er *colonus*. […]; kurz, er war ungefähr das, was unsere Leibeigenen sind.« Höpfner (1798), § 69, 97.

148 »Beyde Arten von Sklaven sind nach Römischem Recht zu beurtheilen.« Ibidem, § 70, 97. Of course, the 1798 edition clarified in a note that the Allgemeine Landrecht had abolished slavery (ibidem, § 70, 99): but on this passage, see Mallinckrodt (2021) 146–147.

149 »Diese sind keine freye Leute, sondern leben in der Knechtschaft. Denn der Herr hat auf ihre Person ein Eigenthumsrecht.« Höpfner (1798), § 70, 98.

150 Ibidem, § 97, 112.

151 Ibidem, § 70, 99.

152 »Wer keinen von diesen drey Civil. Ständen hatte, den sahen sie für keine Person an, sondern rechneten ihn zur Classe der Sachen. Dahin gehörten die römischen Sclaven.« Glück (1791), 1, 5, § 113, 54. »Bey allen Veränderungen, die den Zustand der römischen Sclaverey von Zeit zu Zeit betroffen haben […] ist es doch immer Grundsatz des römischen Rechts geblieben, daß Sclaven zwar Menschen, aber keine Personen im Staate sind.« Ibidem, § 119, 129–130. It may be interesting to note that, in the 1800 edition, we also read: »Heut zu tage nehmen wir jedoch nicht mehr an, daß es Menschen gebe, die keine Personen sind, sondern wir nehmen das Wort Person theils für einen Menschen, in Ansehung eines gewissen Zustandes betrachtet, vermöge welchen er gewisse Rechte und Verbindlichkeiten in der bürgerlichen Gesellschaft hat; theils für einen solchen Zustand selbst, von welchen gewisse Rechte und Verbindlichkeiten in der bürgerlichen Gesellschaft abhangen.« Glück (1800), 1, 5, § 113, 61–62.

153 Glück (1791), § 119, 129 ff.

154 »Zustand der teutschen Leibeigenschaft.« Ibidem, § 120, 135 ff.

out some similarities to them.[155] This is followed by paragraphs on domestic servitude[156] and on the condition of peasants.[157]

In sum, four characteristics seem to reappear in these texts: 1) the importance of the notion of person; 2) its theoretical definition as opposed to the concept of the slave as *res* (»Sache«); 3) slaves and serfs being discussed together; 4) the definition of the latter as persons in contrast to the former, who are denoted things.

VI. Codes and persons

In the lexicon of the French revolutionary constitutions, the term ›person‹ appeared intermittently: the 1789 Declaration of Rights, whose title already refers to the two subjects »man« and »citizen«, used the term »personne« only once, in art. 9, preceded by the possessive pronoun linking it to *l'homme*.[158] The same term recurred eight times in the Constitution of 1791 (including twice with reference to the »personne du Roi« and twice as »personne du detenu«); and three times in the Declaration of Rights that preceded the Constitution of 1793 (arts. 8, 13, 18, again with a possessive reference, as in art. 18[159]), though it was entirely absent from the Constitutional Act itself.

The term was again mentioned twice in the Declaration of Rights that preceded the Constitution of 1795 (arts. 10 and 15), and no less than twelve times in the text of that Constitution (nine of these occurred in the title »De la justice correctionelle et criminelle«, arts. 224, 226–230, 237, 253); in the Constitution of 1799, it appeared twelve times.

However, the concept of person in the sense of legal subjecthood seems to have played a marginal role: the constitutional texts of the Revolution were based more on subjects such as the »man«, the »citizen«, sometimes the »Frenchman«, and often collectively »the people«.

The situation apparently differed little when we look at private law. In the first *Projet de Code Civil* presented by Jean-Jacques-Régis de Cambacérès in 1793, the general provisions opening the first book (»de l'ètat des Personnes«) referred to »les citoyens«, »les individus«,[160] »les mineurs« and »les étrangers«;[161] in the second draft, the general provisions of the first book (»Des Personnes«) referred to the French, to citizens and to foreigners,[162] who remained the main subjects even in the roughly corresponding title of the third *Projet*.[163] There was no single, uniform concept of person, nor did it require specific definition: rather, it consisted of a series of categories of legal subjects that formed the actual reference points of the norms.

The *Code civil* thus refrained from furnishing a complete definition of the concept of person, leading Jean-Guillaume Locrè to comment that »dans le *Code* [le mot *personne*] est le synonyme *d'état civil*«.[164] The title dedicated to persons seemed to rest on other, more specifically defined legal subjects: the Frenchmen, individuals, citizens and foreigners who had already featured in Cambacérès' *Projets*.

155 »Darin haben jedoch die Leibeignen der Teutschen mit der Sclaven der Römer eine Aehnlichkeit, daß sie für ihre Person im Eigenthum ihres Herrn sich befinden, und daher von demselben veräussert werden können, und zwar an einigen Orten nur mit den Höfen, worauf sie gesetzt sind, an andern aber auch ohne das Gut.« Ibidem, § 120, 136.

156 »Zustand des heutigen Miethgesindes.« Ibidem, § 121, 144 ff.

157 »Zustand der heutigen Bauern in Teutschland. Begriff von Bauer, Bauergut und Dorf.« Ibidem, § 122, 146 ff.

158 »Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable, s'il est jugé indispensable de l'arrêter, toute rigueur qui ne serait pas nécessaire pour s'assurer de sa personne doit être sévèrement réprimée par la loi.«

159 »Tout homme peut engager ses services, son temps; mais il ne peut se vendre, ni être vendu; sa personne n'est pas une propriété aliénable. La loi ne reconnaît point de domesticité; il ne peut exister qu'un engagement de soins et de reconnaissance, entre l'homme qui travaille et celui qui l'emploie.«

160 Art. 3: »Il existe dans la nature et par la loi des rapports entre les individus qui composent la société: ces rapport constituent l'état des personnes.« Fenet (1836) 17.

161 Ibidem.

162 Ibidem, 110. For Cambacérès, »trois choses sont nécessaire et suffisent à l'homme en société: être maître de sa personne; avoir des biens pour remplir ses besoins; pouvoir disposer, pour son plus grand intérêt, de sa personne et de ses biens.« Cambacérès (1794) 100.

163 Livre Premier. Des Personnes. Titre I[er]. De l'Etat civil. § 1[er]. Dispositions général. Ibidem, 178–179. See Cambacérès (1796) 141.

164 Locrè (1805) 54. The passage is quoted in Deroussin (2010) 20 and in Niort (2006). On this, see Lefebvre-Teillard (1996) 46 ff. Useful observations can also be found in Wu (2011) 106 ff.

In the Prussian *Allgemeines Landrecht* of 1794, by contrast, the title dedicated to persons began with a definition of the concept.[165] The notion of person also remained central in another product of the natural law tradition, the Austrian *Allgemeine bürgerliche Gesetzbuch* (ABGB). Its celebrated § 16 stated that »Jeder Mensch hat angeborne, schon durch die Vernunft einleuchtende Rechte, und ist daher als eine Person zu betrachten. Sclaverey oder Leibeigenschaft, und die Ausübung einer darauf sich beziehenden Macht, wird in diesen Ländern nicht gestattet.«

Here, once again, slavery and *Leibeigenschaft* were considered together, and explicitly opposed to the condition of person. In his *Commentar* to the ABGB, Franz von Zeiller did, of course, distinguish between slavery and *Leibeigenschaft*, but in his view the latter could come close to the former (»nähert sich, nach Verschiedenheit der zufälligen Modificationen, mehr oder weniger der Sclaverey«). Above all, both are opposed to the condition of person.[166] Von Zeiller did not quote Heinecke in this context, though he had commented on some of the latter's passages on the subject of *homines proprii*.[167] He did, however, take Heinecke's principle that *ex iure Germanicus*, *persona* and *homo* coincided,[168] to its most logical conclusion, though he at the same time turned Heinecke's assertion that *homines proprii* were distinguished from Roman slaves as *personae* and not *res*, on its head: for von Zeiller, even the condition of *homines proprii*, i. e. *Leibeigenschaft*, conflicts with the definition of person.

Arguably, § 16 ABGB and von Zeiller's reflections are the most accomplished products of natural law thought on the concept of person. Historians have strongly emphasised the influence of Kant both on von Zeiller's thinking and on subsequent developments.[169] With regard to the concept of the person, however, legal thought had already entered a new phase by the early 19th century.

Of course, some traces of earlier traditions can be found also in the 19th-century literature. For example, in the 1820 edition of the *Lehrbuch des heutigen römischen Rechts*, Gustav Hugo quoted Heinecke's and Thomasius' definition of *persona* almost verbatim and called it the »customary explanation«, though he did not approve of it: »die sonst gewöhnliche Erklärung von einer Per-

165 1, 1, § 1: »Der Mensch wird, in so fern er gewisse Rechte in der bürgerlichen Gesellschaft genießt, eine Person genannt.« See Conrad (1956) 17 ff.; Hattenhauer, C. (2011) 52 ff.; Hetterich (2016) 83.

166 »[S]o ist jeder Mensch als eine Person zu betrachten, er darf nicht, gleich einer Sache, als Mittel zu beliebigen Zwecken Anderer gebraucht werden. […] Darauf fließt unmittelbar die Vorschrift, daß Sclaverey oder Leibeigenschaft, und die Ausübung einer darauf sich beziehenden Macht in diesen Ländern nicht gestattet werde. Die Sclaverey ist ein Verhältniß, worin der Herr als Eigenthümer, der Sclave als dessen eigenthümliche Sache angesehen, folglich der willkürlichen Behandlung des Herrn Preis gegeben wird. Die Leibeigenschaft, wo die Unterthanen, als ein Zugehör zum Grunde geschlagen, bey dem Grunde, ohne Freyheit der Veräußerung desselben, zu verbleiben genöthiget, oder willkürlich auf einen andern Grund versetzt, dem Gutsherrn zu unbestimmten Diensten und der Züchtigung desselben (höchstens mit der unbestimmten Einschränkung, daß sie dem Leben nicht gefährlich sey) überlassen, ja selbst die Kinder dem Stande ihrer Aeltern zu folgen gezwungen werden, nähert sich, nach Verschiedenheit der zufälligen Modificationen, mehr oder weniger der Sclaverey […].« Von Zeiller also pointed out in a note that »das Römische Recht sagt ausdrücklich, daß die Sclaven keine Personen seyn, sondern in die Classe der Sachen gehören […] (§ 2. J. de jure pers. [Inst. 1.3.2] § 4 J. de cap. demin. [Inst. 1.16.4] L. 209 D. de reg. jur. [D. 50.17.209])«. Zeiller (1811), § 16, 103–105. On this, see Laufs (2006) 200. On the concept of person in von Zeiller, see Conrad (1956) 21 ff.; Hattenhauer, C. (2011) 56 ff. On von Zeiller in general, refer to Di Simone (2006), also for additional literature.

167 »In Germania quatuor olim hominum classes: nobiles scilicet, ingenuos, libertos, et servos, postremorum vero conditionem ab illa romanorum diversam fuisse, memorat Tacitus *de mor. Germ.* c. 25. Medio aevo iisdem varia ministeria, potissimum circa agrorum culturam, et ceteras res rusticas iniungebantur, atque corpora eorum dominis erant obnoxia. Unde passim glebaeadscripti, et *homines proprii (Leibeigne)* appellari ceperunt, vindicari porro, atque cum ipso fundo alienari possunt Heinec. *elem. iur. germ*. § 28. Iure austriaco vero possessoribus rerum immobilium obnoxii, *subditi (Unterthanen)* vocantur, ab omni servitute expresse eximuntur, atque de rebus suis tam per actus inter vivos, quam ultimae voluntatis libere disponunt: salvis tamen dominorum iuribus […].« Zeiller (1781), 1.3. § 85, 95.

168 »Personae ergo Germanis sunt omnes, quibus mens, ratione praedita, in corpore humano contigit, id est eaedem, ac homines.« Heinecke (1748), 1, 1, § 20, 9.

169 Coing (1962) 67 ff., 70 ff.; Conrad (1956) 21 ff.; Hattenhauer, H. (2000) 8 ff.; Hattenhauer, C. (2011) 57 ff.; Herbst (2015); Hetterich (2016) 83–87; Mohr (2011).

son: *homo in statu consideratus* ist nicht bloß um Deswillen schlecht.«[170]

Nevertheless, the centrality of the notion of »legal capacity« entailed, among other things, redefining the role of the concept of person. In the *System des Pandekten-Rechts* (1803), Thibaut answered the question of who can be considered a legally capable subject by using the concept of person.[171] Nevertheless, the fundamental concept on which the reasoning was based was that of legal capacity (»Rechtsfähigkeit«).[172]

Indeed, it was in the context of the notion of »natürliche Rechtsfähigkeit« that Savigny stated that »jeder einzelne Mensch, und nur der einzelne Mensch, ist rechtsfähig«.[173] And it is perhaps useful to note that shortly afterwards, in reconstructing the notion of slavery in Roman law, Savigny himself pointed out that the Romans used the term *persona* not to refer to men having legal capacity, but »für jeden einzelnen Menschen ohne Unterschied, namentlich auch für die Sklaven«.[174]

Precisely on the basis of his assumption that every individual was *rechtsfähig,* Savigny structured the chapter devoted to persons »als Träger der Rechtsverhältnisse« in his *System des heutigen Römischen Rechts* along the limits and restrictions of legal capacity. The assertion that each individual had the capacity to hold rights clearly demonstrates that the centrality of the concept of *persona* and the doctrine of status associated with it had been abandoned. But the individual appeared far from constituting a unitary subject: the very link with the notion of legal capacity seems to expose each individual to new forms of fragmentation, to the point that, as one of the recent works devoted to the concept of person and legal capacity in the 19th century put it, one might speak of a »graduated« form of legal capacity (»einer abgestuften Rechtsfähigkeit«).[175]

VII. Conclusions

As noted, the Justinianic sources did not set a clear boundary between the concepts of *persona* and *res*. The same *servus* could be considered and classified as *res* or as *persona*. The clear boundary between the two was drawn by the legal science of the modern period, between the 16th and 18th centuries, as the joint effect of the two phenomena of serfdom and slavery. It thus had two matrices: one estates-based *(ständisch)*, the other colonial.

Already Iberian legal thought, when dealing with the populations of the newly colonised world, tended to resort to the categories of serfdom and to the notion of slavery according to Roman law to

170 »Eine Person heißt Alles, dem für sich selbst ein Rechtsverhältnis zugeschrieben werden kann. Sie ist entweder eine physische, ein einzelner Mensch; oder eine blos juristische (gewöhnlich, aber nicht gut: moralische, gar auch mystische), mehrere Menschen, die im RechtsVerstande [sic] nur wie ein einzeles [sic] Subject angesehen werden. Die sonst gewöhnliche Erklärung […].« Hugo (1820), § 13, 16–17. See also Hugo (1799b), § 9, 10. Perhaps it is also worth recalling the passages written by Hugo on slavery (»die Einschränkung der persönlichen Freyheit […], nach welcher ein Mensch von dem andern als Sache behandelt wird«) and *Leibeigenschaft* in the first volume of the *Lehrbuch eines civilistischen Cursus*: Hugo (1799a), §§ 57b–58, 50–51. An echo of Heinecke's definition can also be found in a work from overseas, published only a few years before the aforementioned edition of Hugo's *Lehrbuch des heutigen Römischen Rechts*: in José María Alvarez' *Instituciones de derecho real de Castilla y de Indias* (1818), we read that »la palabra hombre es de mayor estension que la palabra persona, porque toda persona es hombre, pero no todo hombre es persona. Hombre es todo aquel que tiene alma racional unida al cuerpo humano: y persona es el hombre considerado con algun estado.« Alvarez (1818) 87. See also Cairns (2012) 65.

171 »Wer kann Subject eines Rechts seyn, und zwar sowohl nach der Natur der Sache (natürliche Rechtsfähigkeit), als den Vorschriften des positiven Rechts (bürgerlichen Rechtsfähigkeit)? Derjenige, welcher in irgend einer Rücksicht als Subject eines Rechts betrachtet wird, heißt insofern Person, besonders insofern man ihn als Subject bürgerlicher Rechte betrachtet; Sache dagegen heißt dann alles, was den Gegensatz einer Person ausmacht.« Thibaut (1803), Allgemeiner Teil, § 188, 140–141. The passage is quoted in Coing (1962) 66, Hattenhauer, H. (2000) 9, and Hattenhauer, C. (2011) 60.

172 »Wichtig an der Person war daher nun, dass sie rechtsfähig war. Aus der Person als einem Oberbegriff des gesamten Rechts wurde ein bürgerlich-rechtliches Instrument, mit dessen Hilfe man Rechtsgegenstände befestigen konnte.« Hattenhauer, H. (2000) 10; see Hattenhauer, C. (2011) 60, (2017).

173 Savigny (1840), 2, 2, § 60, 2.

174 Ibidem, § 65, 33, with reference also to D. 50.16.215 (»[…] in persona servi dominium […]«), D. 50.17.22. pr. (»in personam servilem nulla cadit obligatio«), D. 7.1.6.2.

175 Hofer (2016) 119 ff. On this point, see generally Hetterich (2016) 102 ff. (»Nach Savigny ist damit nicht zu sagen: Jeder Mensch hat allgemeine Rechtsfähigkeit, sondern: In jedem Menschen liegt die Möglichkeit allgemeiner Rechtsfähigkeit«, ibidem, 150).

interpret and classify both the condition of the *Indios* and that of the other non-free subjects. Using slavery and serfdom as opposite ends of a spectrum, they sought to define a subject's legal condition by measuring its respective distance from these poles.

When numerous jurists endeavoured to order the different personal conditions known from the *ius hodiernum* into a complete theory of statuses, Roman slaves and European serfs of the early modern period were treated in the same title (»de iure personarum«, »de statu hominum«, »de prima hominum divisione«). It is here that the condition of the Roman slave is progressively reduced to that of *res*, clearly seen as the opposite of the condition of *persona*: the slave is certainly *homo*, but only from the standpoint of natural law; the category fulfils the role of serving as the opposite against which the legal subject – who, from the standpoint of civil law, is *persona* and not *res* – can be defined.

In this way, a category with essentially theoretical outlines was constituted, or at least its existence highlighted: that of the Roman slaves who, although *homines*, were at the same time reducible to the condition of *res*, and thus the mere object of legal relationships in civil law.

However, this concept of the slave was by no means exclusively theoretical: as we have seen in the reflections of some Iberian scholars, Roman slavery was a comparative reference point for the condition of unfree subjects overseas, and Roman law was deemed immediately applicable in matters of slavery by the 1636 *Instructie* of the United Provinces' States General, without, moreover, slaves being openly reduced to the condition of *res*. Finally, Louis XIV's edict of March 1685 explicitly denoted slaves »choses mobiliaires« (Art. 46). As we saw above, Pothier thought that the condition of Roman slaves was directly reflected in contemporary slaves in the colonies: Roman slaves »étaient regardés comme des choses, plutôt que comme des personnes, *ut res, non ut personae erant in dominio heri*«, and »nous avons dans nos Colonies de ces sortes d'esclaves, qui sont les Nègres, dont il se fait un commerce considérable«.[176]

For Pothier and other early modern jurists, then, slaves were *res* in the simple sense of »chose« or, as also seen (e. g. in von Zeiller[177]), »Sache«.

It is perhaps worth noting that this sharp separation between *persona* and *res*, or between person and thing, was elaborated for reasons that appear extraneous to historical-philological reflection on the Justinianic sources, or on Roman law as such. The latter could be directly applicable, as stated in the 1636 *Instructie* of the States General for the United Provinces' territories in Brazil. Generally, however, the function of Roman law appears to have been that of providing a lexicon on the basis of which, even if only by comparison, jurists worked out solutions to the questions arising from the needs of their time.

This therefore seems to be a first possible conclusion:

1) Serfs and slaves defined the concept of person because they constituted its boundary. On one side of the boundary there were persons, on the other *res*: as if, in order for someone to remain a person, someone else had to be a thing. In this way, serfdom and modern slavery together defined the contours of the concept of person, which the legal science of the *Ancien régime* transmitted to that of the 19th century and the contemporary age.

However clear-cut, this boundary was also mobile, since it ran through individuals who, depending on the circumstances and the legal relations in which they found themselves, could be either *personae* or *res*. This was the case of the *homines proprii*: as we have seen, this term was used by most of the abovementioned jurists to define subjects of servile condition who enjoyed »ius connubiorum«, »ius contractuum« and »ius testamentorum«.[178] They constituted a category so ambiguous as to represent a sort of »tertium genus« between freemen and slaves,[179] so much so as to lead early modern jurists to hypothesise the existence of a profoundly different servile condition from that of the Roman slaves.[180] To distinguish the two, *homines proprii* were attributed the

176 Pothier (1778), 1, 4, 571.
177 Zeiller (1811), § 16, 104 n.
178 Stryk (1690), §§ 6–8, pp. 82–84;
Thomasius (1712), 1, 3, 16;
Heinecke (1747), 1, 3, § 85, 21–22.
179 Stryk (1690), 1, 5, § 1, 78–79.
180 Thomasius (1712), 1, 3, 14.

condition of *persona* and, at the same time and for the same reason, Roman slaves the condition of *res*.

But *homines proprii*, while not being slaves, could also be alienated: the fact of being *personae* did not protect them from being, in certain circumstances, mere objects of a legal relationship. They could be considered as persons or as things, depending on different legal relationships under civil law. However, this was also true for slaves *stricto sensu* if one considered their condition from the point of view of the law of nature, or canon law, or more simply their spiritual health.

This leads to the second possible conclusion:

2) The boundary between persons and things elaborated by legal thinkers between the 16th and 18th centuries was clear-cut, but it did not separate different groups; rather, it cut across individuals: it was an internal boundary within individual subjects.

This latter aspect, the result of both the estates-based and the colonial matrices, seems to have persisted in the subsequent stages of legal history: regardless of the qualities of person or thing, the fact that the notion of legal capacity was susceptible to gradations implied the permanence of boundaries within the same individual. However, in the 19th and 20th centuries, these boundaries would be the result of entirely new reasons.

■

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